

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JONATHAN DALE SIMMONS, Petitioner v.  
SOUTH CAROLINA

CASE NO: No. 92-9059

PLACE: Washington, D.C.

DATE: Tuesday, January 18, 1994

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3       JONATHAN DALE SIMMONS,                   :

4                   Petitioner                   :

5               v.                               :   No. 92-9059

6       SOUTH CAROLINA                       :

7       - - - - -X

8   Washington, D.C.

9   Tuesday, January 18, 1994

10               The above-entitled matter came on for oral  
11       argument before the Supreme Court of the United States at  
12       11:00 a.m.

13       APPEARANCES:

14       DAVID I. BRUCK, ESQ., Columbia, South Carolina; on behalf  
15       of the Petitioner.

16       RICHARD A. HARPOOTLIAN, ESQ., Solicitor, Fifth Judicial  
17       Circuit, Columbia South Carolina; on behalf of the  
18       Respondent.

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1 P R O C E E D I N G S

2 (11:00 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 92-9059, Jonathan Dale Simmons v. South  
5 Carolina.

6 Mr. Bruck, you may proceed.

7 ORAL ARGUMENT OF DAVID I. BRUCK

8 ON BEHALF OF THE PETITIONER

9 MR. BRUCK: Mr. Chief Justice, and may it please  
10 the Court:

11 The issue in this capital case is whether the  
12 prosecution can secure a death sentence on the grounds of  
13 the defendant's future dangerousness, while at the same  
14 time concealing from the sentencing jury a crucial aspect  
15 of its noncapital sentencing alternative, namely that life  
16 imprisonment means life without parole.

17 Future dangerousness was the primary reason  
18 advanced by the State in this case why the jury should  
19 sentence Jonathan Simmons to death. The defense  
20 acknowledged that the petitioner, by reason of his serious  
21 mental illness, was, in fact, dangerous or would be, in  
22 fact, dangerous were he released back into society.  
23 However, the defense showed, by expert and lay testimony,  
24 a likelihood that the petitioner would make a nonviolent  
25 and cooperative prison inmate.



1           Now, the jury itself identified the crucial  
2 piece of missing information in this presentation. After  
3 90 minutes of deliberation on the issue of penalty, the  
4 jury returned to the courtroom and asked the following  
5 question: Does the imposition of a life sentence carry  
6 with it the possibility of parole?

7           And the trial judge responded by telling them  
8 three things: you are instructed not to consider parole;  
9 that is not a proper issue for your consideration; and  
10 life imprisonment and death sentence are to be understood  
11 in their plain and ordinary meaning.

12           The issue in this case arises because of the  
13 fact that under South Carolina law the correct answer to  
14 the jury's question was no. Because Jonathan Simmons had  
15 prior convictions for a violent offense, under South  
16 Carolina law life meant exactly that, life without the  
17 possibility of parole. That was what the jury wanted to  
18 know and that is what the petitioner urged they be told.

19           The State, from the very beginning of the trial,  
20 successfully impressed upon the trial judge not to tell  
21 the jury. It was obvious how critical this information  
22 was going to be and the -- it was obvious what an  
23 advantage the State would receive if alone among everybody  
24 in the courtroom, the jury alone would be the only ones  
25 not to know.

1 QUESTION: Mr. --

2 QUESTION: Well, Mr. Bruck, are you arguing that  
3 a State has an obligation to provide a truthful answer to  
4 any question that a jury may ask?

5 MR. BRUCK: No, not at all. But here where  
6 there is absolutely no justifiable, there is no rational  
7 State interest in refusing to give the information that  
8 the jury asked for and where the information on the facts  
9 of this particular case was so crucial to a reliable and  
10 fair determination of the sentence.

11 QUESTION: Well, can a State say that we're not  
12 going to answer jury questions that involve collateral  
13 matters that are just going to distract the jury?

14 MR. BRUCK: Certainly. However, what the  
15 alternative to death is in a case where the State is  
16 basically saying -- not basically, where the State is  
17 literally arguing to the jury this is a matter of self-  
18 defense. That was Mr. Harpootlian's jury argument. The  
19 question before you is what to do with someone who is a  
20 threat.

21 He told the jury you -- the issue is not what  
22 made him this way. There was all this evidence of very  
23 very extreme abuse and sexual abuse and violence in this  
24 man's childhood. The State's response was the question  
25 before you is what to do with him now that he is in our

1        midst.

2                    QUESTION: Do juries or judges in South Carolina  
3        impose sentences in noncapital cases?

4                    MR. BRUCK: No, they do not.

5                    QUESTION: Well, one must. I asked do juries or  
6        judges?

7                    MR. BRUCK: Oh, I'm sorry, excuse me. There is  
8        no jury sentencing except in one or two -- no there is, I  
9        believe, non whatsoever now.

10                   QUESTION: So supposing that in a noncapital  
11        case a jury comes in with a question after some  
12        deliberation and they want to know what the sentence is  
13        for this offense if they find the person guilty, is a  
14        State obligated to furnish that information?

15                   MR. BRUCK: Not by any means. And the reason  
16        for that is that the jury's task at the -- in the  
17        hypothetical you put to me is to determine guilt or  
18        innocence, without regard to what is going to happen. But  
19        in this case, in capital sentencing, the jury's task is to  
20        sentence. And, of course, the State cannot derive any  
21        comfort from the principle that sentencing issues  
22        shouldn't interfere with guilt in a proceeding which is a  
23        sentencing hearing.

24                   QUESTION: What your position really boils down  
25        to is not, as I understand it, a position about

1 information or a position about alternatives. It boils  
2 down to the position that the jury should know the meaning  
3 of the terms, the meaning which the law gives to the terms  
4 that the jury is required to use in pronouncing the  
5 sentence. Is that the nub of it?

6 MR. BRUCK: Yes. And most particularly our  
7 Gardner claim, our due process claim, is that even if the  
8 Eighth Amendment did not require an affirmative answer to  
9 that question, where the State puts the meaning of the  
10 noncapital sentencing so clearly into issue -- and we know  
11 it was an issue not only because of the evidence and the  
12 solicitor's -- the prosecutor's argument, but because of  
13 the jury's question. There surely -- leaving all this  
14 Court's Eighth Amendment jurisprudence to one side for a  
15 moment, there obviously it just isn't fair.

16 QUESTION: What if the jury asks -- surely, you  
17 know, how severe the alternative punishment is is always  
18 an issue. Suppose the jury comes back and says do  
19 prisoners in State prisons have television sets; how big  
20 are the cells in State prisons?

21 MR. BRUCK: I would submit that there is -- one  
22 quite reach -- readily reaches a de minimis level where  
23 the --

24 QUESTION: Well, I don't know that that's de  
25 minimis. The -- you know, will this man be on a chain



1 gang or are there any chain gangs in the State anymore?

2 MR. BRUCK: Um --

3 QUESTION: Those are very relevant questions for  
4 a jury that wants to know how severely this person is  
5 going to be punished if the capital sentence is not  
6 imposed. Why are those questions irrelevant? I don't  
7 think they're irrelevant at all.

8 MR. BRUCK: I don't think they have absolutely  
9 no relevance, but I think it is within the broad range of  
10 the State's ability, under cases such as Johnson v. Texas,  
11 to channel and mold the jury's consideration of sentencing  
12 factors.

13 QUESTION: But just not this question. The  
14 other ones can be excluded but this one can't.

15 MR. BRUCK: No, that's correct. Because this  
16 issue not only goes to the retributive -- although we  
17 think the retributive importance of this life without  
18 parole information is very significant, but it pales  
19 towards -- beside the incapacitating --

20 QUESTION: What if there's a statutory amendment  
21 pending that would eliminate parole? Is the judge  
22 supposed to tell; how does he answer?

23 MR. BRUCK: That would eliminate parole --

24 QUESTION: There is no -- parole is  
25 unavailable -- I'm sorry, that would make parole

1 available. Parole is unavailable now, but there is a bill  
2 currently being debated. Can he tell them that?

3 MR. BRUCK: I would think --

4 QUESTION: I mean, isn't that the problem of  
5 answering them with respect to anything that --

6 MR. BRUCK: I don't think the Constitution,  
7 obviously, requires that they be told. I think this is --  
8 generally, the whole range of -- well, can we tell them  
9 this; can we tell them that -- that is found in the  
10 State's brief, was answered 10 years ago in California v.  
11 Ramos. The Court addresses the question, is the  
12 information reliable; is it accurate?

13 QUESTION: But you -- you keep answering these  
14 questions in terms of information. Why don't you answer  
15 the question in terms of meaning? They want to know  
16 whether life means life or means something else, and isn't  
17 that a far stronger argument than simply the argument that  
18 there are degrees of relevance of extraneous information.  
19 This isn't a question about extraneous information; it's a  
20 question about meaning, isn't it?

21 MR. BRUCK: Well, I agree with that, but I  
22 suppose the -- Justice Scalia's question could always be  
23 posed, well, it means life without parole, but then it  
24 also means that he will or won't have a TV set. I don't  
25 agree with that and I think that stretches --

1 QUESTION: It's life in prison, but it isn't  
2 really prison.

3 MR. BRUCK: Whatever. I think that stretches  
4 the concept of the meaning of a sentence beyond all  
5 bounds, but I can -- I would be surprised if my friend  
6 doesn't make the argument in a moment.

7 QUESTION: But doesn't -- but your point is the  
8 meaning of a word.

9 MR. BRUCK: Yes.

10 QUESTION: Yeah.

11 MR. BRUCK: Yes, that's right. And the  
12 importance of clarifying what the meaning --

13 QUESTION: Well, do you argue simply that you're  
14 entitled to the instruction if the jury asks?

15 MR. BRUCK: No.

16 QUESTION: Is not the foundation of your  
17 argument that the defense counsel is entitled to make this  
18 argument to the jury if it chooses?

19 MR. BRUCK: Absolutely. And the trial judge, at  
20 the prosecutor's urging, refused to allow precisely that  
21 argument. And you can see --

22 QUESTION: Well, what --

23 QUESTION: So is the premise of that position  
24 that the jury is entitled to hear from counsel or from the  
25 court anything that is likely to be relevant to the jury's

1 sentencing decision? Is that the working principle we  
2 have?

3 MR. BRUCK: Well, turning to the Eighth  
4 Amendment, the Skipper-Locket aspect, which this Court  
5 need not reach, but if it were to reach that, I think the  
6 language from Justice Powell's opinion in McCleskey, any  
7 relevant circumstance which could cause the jury to fail  
8 to -- to decline to impose the death penalty. Now --

9 QUESTION: So if a prosecutor wanted to put  
10 in -- or, pardon me, a defense counsel wanted to put in a  
11 videotape of what an execution looks like, he should be  
12 able to do that so the jury could see the consequences of  
13 what they're doing?

14 MR. BRUCK: No. Because I think given the fact  
15 that the method of execution is constrained by the Eighth  
16 Amendment and there is no torturous or cruel form of  
17 execution permitted, I think it is within -- Lockett does  
18 not remove the power of the State to say that that is not  
19 relevant, and therefore it is not irrelevant circumstance.  
20 But it is impossible to say that the fact that Jonathan  
21 Simmons will not allow -- again, allow -- be allowed to be  
22 paroled and to roam the streets is not a relevant  
23 circumstance.

24 QUESTION: I suppose we're struggling for the  
25 definition of what's relevant.



1 MR. BRUCK: Yes.

2 QUESTION: How are we going to do that in the  
3 confines of this case, other than make it parole specific?

4 MR. BRUCK: Well, of course, this case is about  
5 parole, and the Court need go no further than to say that  
6 when the State has a -- has a dangerous mentally ill  
7 defendant who it wishes to execute, it cannot urge the  
8 jury -- it cannot create a false dilemma. I think Beck is  
9 instructive, although not on point, in this area.

10 QUESTION: But that leaves us without a guiding  
11 principle.

12 MR. BRUCK: The Court has struggled with the  
13 meaning of relevant. In Skipper the State of South  
14 Carolina urged that it was not relevant that the defendant  
15 would be a well-behaved prisoner, because it went -- in  
16 the future in prison, because it went neither to his  
17 character and record nor to the circumstances of the  
18 offense. And the Court responded that that future --  
19 likely future behavior, albeit only in prison, was  
20 relevant in the sense -- or was mitigating in the sense  
21 that it might reasonably incline the jury to be less  
22 likely to vote for a sentence of death.

23 QUESTION: Mr. Bruck, may I try to ask what it  
24 is exactly you're urging, that the defendant had a right  
25 to put in evidence about what the parole system law meant

1 in South Carolina?

2 MR. BRUCK: No, we do not think that it was  
3 necessary. This was a matter of law and our claim is  
4 limited to those situations in which --

5 QUESTION: Well, is it an argument that the  
6 defendant's lawyer should have been allowed to argue it to  
7 the jury, or do you say that in every case the trial court  
8 should, sua sponte, instruct on it? I don't know what it  
9 is you're really asking us to hold.

10 MR. BRUCK: I'm asking --

11 QUESTION: What's your request here?

12 MR. BRUCK: I'm asking you to hold that where  
13 parole is not an option, where State law is clear, as it  
14 is here, that the jury not have that information withheld  
15 from them. Our -- the center of our case was a request  
16 that State law be instructed to the jury by the judge.

17 QUESTION: But if you were allowed to tell the  
18 jury in your argument that life means life, you wouldn't  
19 have a constitutional objection, I take it. Your argument  
20 is the jury must be told.

21 MR. BRUCK: Yes.

22 QUESTION: But does it require the judge to tell  
23 them, or -- the judge wouldn't permit you to tell them  
24 either, right?

25 MR. BRUCK: That's correct. The State moved and

1 the judge so ruled.

2 QUESTION: So is there a constitutional  
3 distinction that requires the judge be the one to say it,  
4 or is your point that the term "life" must be defined --  
5 you must be allowed to define it for the jury? Whether  
6 counsel does it or the court does it is not a  
7 constitutional distinction.

8 MR. BRUCK: It is the latter. So long as the  
9 defendant is able to have the jury informed, whether it be  
10 by his counsel or by the court. Now, of course, the jury  
11 might not take counsel's word for it and might very well,  
12 even had argument been allowed, come back with this  
13 question, in which case we think that the judge should  
14 have responded.

15 QUESTION: I assume --

16 QUESTION: And that is because parole is likely  
17 to be an essential or a material or a substantial factor  
18 in the jury's decision? Is that the standard we're  
19 working with? We need a standard here. I know what you  
20 want so far as specific relief, but I'm not sure of the  
21 underlying principle.

22 MR. BRUCK: Yes, I think that the -- it's -- it  
23 is difficult for me to lay down a rule, I think, that does  
24 not have some element of generality in it to propose one.  
25 And I think -- I don't know that the Court need establish

1 or that it is possible to establish a bright-line rule  
2 which will clearly cover every conceivable fact situation.

3 QUESTION: Yes, but isn't it part of your  
4 case -- now I don't know if -- there's some evidence in  
5 the record, as I understand it, that without this  
6 instruction the jury will be acting on a false premise.

7 MR. BRUCK: Absolutely, absolutely.

8 QUESTION: So your -- whatever your standard is,  
9 it's limited to situations, as I understand it, where in  
10 the absence of an instruction the jury will be mislead.

11 MR. BRUCK: Yes.

12 QUESTION: And mislead, as I understand it,  
13 about the law.

14 MR. BRUCK: That's correct, about the meaning --

15 QUESTION: You sometimes speak in terms of fact,  
16 but what you want them told is what a legal term means  
17 which they have got to use in sentencing.

18 MR. BRUCK: That is correct.

19 QUESTION: And some jurors may think it means  
20 life subject to parole, other jurors may think it means  
21 life without parole, and you want that legal definition  
22 given to them.

23 MR. BRUCK: That is correct.

24 QUESTION: So why don't you just limit your  
25 principle here to saying when there is a legitimate doubt



1 about the meaning of a term which is used in instructing  
2 the jury, and which the jury must, in turn, use in  
3 sentencing, that term must be defined. Why don't you go  
4 to that point and stop?

5 MR. BRUCK: That is a entirely satisfactory way  
6 of framing the issue and it does -- I must say that it  
7 does simplify the issue of how to --

8 QUESTION: It does, Mr. Bruck. But if it goes  
9 to the meaning of the word, I assume it would go the  
10 meaning whether the answer is yes or no, right? And that  
11 would mean the prosecutors would be entitled to introduce  
12 in these cases the fact that if you give this individual  
13 life, it really doesn't mean life, he'll be walking the  
14 streets in 20 years, right?

15 MR. BRUCK: I read Ramos --

16 QUESTION: Fair is fair.

17 MR. BRUCK: Fair is fair.

18 QUESTION: If it goes to the meaning of the  
19 word, right, right.

20 MR. BRUCK: Fair is fair.

21 QUESTION: Now, it is my impression -- it is --

22 QUESTION: I just want --

23 MR. BRUCK: I agree with that if it's true.

24 QUESTION: Yeah.

25 MR. BRUCK: If the prosecutor can produce South

1 Carolina law to show that, in fact --

2 QUESTION: Right, right, right.

3 MR. BRUCK: -- Life doesn't really mean life,  
4 even though there's no parole. Ramos settled that a long  
5 time ago.

6 QUESTION: It's my impression that some States  
7 exclude information about parole for the very purpose that  
8 juries will not distort the State parole system by  
9 discounting it in advance, so that knowing that a person's  
10 going to get time off for good behavior, or whatever, they  
11 up the sentence from what it otherwise would be in order  
12 to defeat the parole system.

13 MR. BRUCK: Yes.

14 QUESTION: That's a perfectly rational thing for  
15 a State to do, it seems to me. And you're saying that  
16 that can't be done, because 35 years doesn't really mean  
17 35 years if there's a parole system, or life does not  
18 really mean life if there's a parole system.

19 MR. BRUCK: No, I don't say that can't be done  
20 at all. The crucial fact here is that there is no parole  
21 system for this defendant.

22 QUESTION: Isn't the crucial fact that the jury  
23 is sentencing here and the jury is normally not  
24 sentencing.

25 MR. BRUCK: Well, that's true. And, of course,

1 the information -- the legal definition that we think the  
2 jury should have had of its sentencing alternative is a  
3 legal definition known to the sentencer in 99.9999 percent  
4 of sentencing proceedings.

5 QUESTION: Well, what if the jury comes in with  
6 a question after deliberation and asks in what prison  
7 would a life term be served?

8 MR. BRUCK: Well, I do not view that as part of  
9 the legal definition of its sentencing alternative.

10 QUESTION: Well, then, how do you define the  
11 legal definition of a sentencing alternative?

12 MR. BRUCK: Well, South Carolina law does not  
13 provide for statutory law. The law defining the  
14 punishments does not deal with classification and  
15 institutional assignment.

16 Now, I don't think that there is any -- if the  
17 State wants to show, through evidence or however, that  
18 there are huge security -- there are -- you know, there  
19 are some -- in other words, if a State wishes to show  
20 facts about the prison system that support its view of  
21 future dangerousness and show that the risk from the  
22 defendant is greater than simply life without parole might  
23 suggest, I see, under California v. Ramos, the  
24 Constitution providing no bar.

25 QUESTION: Well, could a State -- could a

1 State -- could the prosecutor produce evidence that the  
2 place all these lifers are sent is really not a very well  
3 built prison and it would be fairly easy to break out of?

4 MR. BRUCK: If that information is accurate, I  
5 think that that -- that under the -- I would be very  
6 surprised if a State supreme court would allow that sort  
7 of collateral trial, but I, frankly, have to say I don't  
8 read the Eighth Amendment, under your cases, as creating a  
9 bar. Providing -- the touchstone is accuracy and  
10 reliability, and I think -- our claim does not engage all  
11 of these factual matters.

12 QUESTION: Well, isn't it even narrower than  
13 that, Mr. Bruck? The touchstone you say is reliability,  
14 but also your -- part of your touchstone, as I understand  
15 your argument, is that in the absence of the instruction  
16 the jury would be acting on a false premise.

17 MR. BRUCK: Yes.

18 QUESTION: Now, in the Chief Justice's example  
19 it presumes, you know, one State prison in each State, and  
20 presumably there's not much doubt about where the man's  
21 going to go, so you wouldn't need the instruction.

22 MR. BRUCK: That's correct.

23 QUESTION: And if they thought they were all  
24 going to spend their life in a country club somewhere,  
25 then perhaps it would be appropriate to clear up the



1       misunderstanding.

2                   MR. BRUCK:   That's correct.

3                   QUESTION:   You're saying the jury will send this  
4       man to his death if he -- if it knows he's only otherwise  
5       going to be in prison for 25 years, whereas it might  
6       otherwise not.

7                   MR. BRUCK:   Might, and we submit in this case  
8       likely did, yes.

9                   QUESTION:   Well.

10                  QUESTION:   Because the jurors came in and asked  
11       the question.

12                  MR. BRUCK:   Because of the way the case was  
13       presented; because of the facts of the case; because of  
14       the manifest dangerousness of this man's record and of his  
15       mental illness; because of the prosecuted argument;  
16       because of the fact that the defense was prevented from  
17       making this crucial argument that you can protect society  
18       adequately, you can exercise the right of collective self-  
19       defense without putting him to death.

20                  And because, finally, lest there be the  
21       slightest doubt, the jury not only came back and asked the  
22       question, but when the judge gave a "don't think about  
23       that" response, where clearly the question called for a  
24       yes or no answer, and telegraphed to the jury that -- in  
25       effect, that, yes, there is parole but that's not -- we

1 don't talk about that here, the jury was back in 25  
2 minutes with death. It was thank you very much; that is  
3 what we needed to know; we are not going to take the risk  
4 that this man will be back on the street in the very vivid  
5 way that the prosecutor described in his closing argument.

6 QUESTION: Mr. Bruck, but if we're talking about  
7 what does the term "life" mean, I take it you're saying  
8 you should be allowed, or the judge should instruct to say  
9 that there is no parole in this case. On the other hand,  
10 the prosecutor could then say but the Governor has certain  
11 authority, they could let this person out, or that the law  
12 could change.

13 QUESTION: The Governor in South Carolina does  
14 not have that authority. If he did, Ramos is on point, I  
15 think, and would, under the Eighth Amendment, allow that  
16 instruction. A change of law is a more difficult  
17 question, but for the purposes of our -- because the idea  
18 that the law could change is sort of a universal solvent  
19 in which the entire idea of guided discretion tends to  
20 disappear, leaving only the finality of death as the only  
21 guidepost.

22 But even -- for purposes of our argument today  
23 and for purposes of deciding this case, even the fact  
24 that -- if the judge were to instruct under current law,  
25 or subject to further action by the legislature, I don't

1 think that that in any way affects our submission today.  
2 The State didn't want to get a fair hearing on this or  
3 spell out or clarify the definition of the definition of  
4 life imprisonment. The State wanted to keep the jury in  
5 the dark and the State was successful in doing exactly  
6 that.

7 And I submit that under the Due Process Clause  
8 on the facts of this case, under the reliability prong of  
9 this Court's line on this Court's Eighth Amendment cases,  
10 and we also submit under the Lockett-Skipper line of the  
11 right to present mitigating evidence and to have  
12 mitigating evidence given substantial and reasonable  
13 weight in the jury's deliberations.

14 Because the failure to define the life  
15 imprisonment punishment rendered almost meaningless the  
16 defendant's Skipper evidence, his good behavior in prison  
17 evidence. What difference would it make if he's only  
18 going to be in prison for 5 or 10 years? We're concerned  
19 about what happens what he's paroled. And, indeed, the  
20 fact that he's a good inmate might actually, to the jury,  
21 make it more likely that he'll be paroled sooner and back  
22 on the streets.

23 So for all of those reasons, we submit that what  
24 happened here cannot be squared with the Constitution of  
25 the United States. And I would note too that this is, in

1 terms of what goes on around the country, a very narrow  
2 issue. Because of the States which have parole, precious  
3 few of them try to put this sort of a thumb on the scales  
4 for death. They tell the jury forthrightly, in the  
5 overwhelming majority of States, and I believe it goes  
6 down the line of them, that if life means life, that is  
7 usually part of the sentencing verdict itself, and the  
8 jury is not left in the dark and defendants are not  
9 exposed to the sort of unfairness that happened in this  
10 case.

11 If I may, I should like to reserve the remainder  
12 of my time for rebuttal.

13 QUESTION: Very well, Mr. Bruck.

14 Mr. Harpootlian, we'll hear from you.

15 ORAL ARGUMENT OF RICHARD A. HARPOOTLIAN

16 ON BEHALF OF THE RESPONDENT

17 MR. HARPOOTLIAN: Mr. Chief Justice, if it  
18 please the Court:

19 It seems to me that the linchpin of Mr. Bruck's  
20 argument, and the fiction that we need to examine, is that  
21 throughout his argument to the lower court and his  
22 presentation here today he equates the term "ineligibility  
23 of parole" with "ineligibility of release." When the jury  
24 came back and asked when would he be eligible for parole,  
25 were they asking that limited, specific, technical term,

1 or were they asking when will he be eligible to be  
2 released?

3 QUESTION: Why don't we assume that they were  
4 asking what they asked, and they asked about eligibility  
5 for parole?

6 MR. HARPOOTLIAN: Well, Justice Souter, they may  
7 have asked about eligibility for parole. The requested  
8 instruction by Mr. Bruck during trial was concluded with  
9 the term that he will remain in jail for the rest of his  
10 life. In South Carolina while the Governor does not have  
11 the power to pardon, the Pardon and Parole Board does.

12 QUESTION: Well, maybe Mr. Bruck's suggested  
13 instruction was inaccurate in that respect, but do you  
14 take the position that the jury should not be told the  
15 meaning of a term about which it has a legitimate  
16 question?

17 MR. HARPOOTLIAN: I think the jury should be  
18 told the meaning of the term.

19 QUESTION: Well, do you think there's a  
20 legitimate question possible in the minds of jurors, given  
21 what most people know or think they know about the penal  
22 system, as to whether or not the term "life" includes a  
23 parole eligibility factor or whether it doesn't? Is that  
24 a legitimate question?

25 MR. HARPOOTLIAN: I think it is a legitimate



1 question, and the response by the South Carolina judge  
2 under the South Carolina case of Torrence is that you  
3 cannot consider parole; do not consider parole or parole  
4 eligibility.

5 QUESTION: In other words, it's a legitimate  
6 question about the meaning of the terms, but the jury  
7 cannot be given a legal answer.

8 MR. HARPOOTLIAN: Well, I think that the jury  
9 was given the legal answer, which is something we should  
10 not consider. It is not something that you should  
11 consider as part of your sentence.

12 QUESTION: But the consequence of that, it seems  
13 to me, based on what you've already said, is that the jury  
14 should not be informed about the meaning of a term that  
15 it's got to use. It's got to say life or death. The jury  
16 should not be informed about the legal meaning of that  
17 term when the jury has a question about it.

18 MR. HARPOOTLIAN: They were given the meaning of  
19 the term "life." They were told --

20 QUESTION: You mean in the last sentence of the  
21 judge's response.

22 MR. HARPOOTLIAN: Yes.

23 QUESTION: Plain and ordinary meaning.

24 MR. HARPOOTLIAN: Yes, sir. "Life" --

25 QUESTION: But isn't the problem with that that

1 that is a -- given the premise of the question, it is a  
2 totally ambiguous answer. If you use the -- if it has the  
3 ordinary meaning in the mind, certainly, of some jurors --  
4 and I would have been one of those jurors myself -- then  
5 it means yes, "Life" means subject to parole. If you give  
6 it a plain meaning which is not ordinary, then it would  
7 mean life does not include eligibility for parole. It  
8 seems to me that if you've got to answer the question,  
9 that wasn't much of an answer.

10 MR. HARPOOTLIAN: Well the answer was life means  
11 life. The answer was --

12 QUESTION: No, that isn't what the answer was.  
13 The answer was you give the terms their plain and ordinary  
14 meaning --

15 MR. HARPOOTLIAN: Without considering --

16 QUESTION: And if you give it a plain meaning in  
17 a strict sense, it means life means life. If you give it  
18 a meaning in an ordinary sense to lots of jurors who think  
19 they -- who have heard about the parole system, then it  
20 would mean subject to parole. But whatever that answer  
21 was, it was not a plain answer.

22 MR. HARPOOTLIAN: But they have been told not to  
23 consider parole.

24 QUESTION: But you're then simply, it seems to  
25 me, backtracking on your answer. You agree that they

1 ought to know the meaning of the terms that they've got to  
2 use in sentencing. You don't dispute that.

3 MR. HARPOOTLIAN: No, sir, I don't dispute that.

4 QUESTION: And you are now saying, but they  
5 can't be told about that term.

6 MR. HARPOOTLIAN: I don't think that is a term  
7 that is necessary for them to know about in sentencing.  
8 It is a decision to be made --

9 QUESTION: In other words when they have to make  
10 a choice between the death penalty and life imprisonment,  
11 they don't need to know the meaning of life imprisonment?

12 MR. HARPOOTLIAN: Life imprisonment, for their  
13 purposes, was defined as life imprisonment. Life --

14 QUESTION: Well, we're getting -- we're getting  
15 nowhere, because the question is whether they are entitled  
16 to a clear definition responsive to their question.

17 MR. HARPOOTLIAN: And I submit that they got a  
18 clear definition of that charge.

19 QUESTION: So your answer, then, is that they  
20 were entitled to the answer, they are entitled to know the  
21 meaning of the terms they have to use, but there's no  
22 problem here because the definition they got was adequate.

23 MR. HARPOOTLIAN: They do not need to know the  
24 definition of the term "parole" to make that decision.

25 QUESTION: But they do need to know the

1 definition of the term "life" or "life imprisonment."

2 MR. HARPOOTLIAN: Yes, sir. And they were given  
3 that.

4 QUESTION: Okay. And you say they -- you agree  
5 that they're entitled to that and you say they got it.

6 MR. HARPOOTLIAN: Yes, sir.

7 QUESTION: Okay.

8 MR. HARPOOTLIAN: To go beyond life means life,  
9 and that's exactly what they were told, we would have to  
10 discuss pardon, work release, furlough.

11 QUESTION: Excuse me, I don't want to play with  
12 words, but that is not exactly what they were told. They  
13 were told that the terms the court had used were to be  
14 given their plain and ordinary meaning.

15 MR. HARPOOTLIAN: Yes, sir. Because to go  
16 beyond that would open up, in the South Carolina court's  
17 opinion, a can of worms.

18 QUESTION: Well, what you contend is that they  
19 were told that the sentence that they would impose would  
20 be a sentence of life imprisonment.

21 MR. HARPOOTLIAN: Yes, sir.

22 QUESTION: And you think they do not have to be  
23 told that there are other laws which we have in our State  
24 which would enable a person sentenced to life in prison,  
25 which is a sentence for life, to perhaps get parole, to

1 perhaps get a pardon, to perhaps get work relief, all  
2 other different laws which have nothing to do with the  
3 meaning of the word "life."

4 MR. HARPOOTLIAN: That is correct, Justice  
5 Scalia. And in -- this Court, in a number of cases, Penry  
6 v. Lynaugh, did not define the term -- the court did not  
7 define the term deliberately. And yet this Court found  
8 that was sufficient.

9 QUESTION: But I take it, then, that if we think  
10 or a majority of us think that the definition was  
11 inadequate, that it just did not respond to the jury's  
12 perplexity, that you would agree there would have to be a  
13 reversal here?

14 MR. HARPOOTLIAN: No, sir, I would not agree  
15 with that.

16 QUESTION: Then I don't understand what I  
17 thought was your answer to the question of whether the  
18 jury was or was not entitled to be told the definition of  
19 the terms it was using. Because if they're entitled to be  
20 told the definition and the definition is not inadequate,  
21 I would suppose it would follow that there would be a  
22 reversal.

23 MR. HARPOOTLIAN: No, sir. My position is  
24 that -- first of all, I would not -- obviously, for  
25 purposes of your hypothetical, that it would fail. I



1 don't concede it fails. It's difficult for me to get to  
2 the logical assumption that it fails, for a number of  
3 reasons.

4 QUESTION: But let's assume, for the sake of the  
5 hypothetical, that it does fail, there would have to be a  
6 reversal, wouldn't there?

7 MR. HARPOOTLIAN: Well, I would submit that the  
8 definitional term of "life imprisonment," if you have to  
9 define every term, if you have to parse --

10 QUESTION: No, but you're -- with respect, I  
11 don't want to cut off your argument, but I want you to  
12 answer my question, and I think what you're doing is  
13 basically denying my premise.

14 If we conclude that the definition was not  
15 adequate to inform them --

16 MR. HARPOOTLIAN: You --

17 QUESTION: -- Do you agree that there would  
18 have to be a reversal here?

19 MR. HARPOOTLIAN: As to the second part of the  
20 charge, if that was inadequate, that life means life, that  
21 you were to give it the plain and ordinary meaning.

22 QUESTION: Yeah, yeah.

23 MR. HARPOOTLIAN: I would not concede that  
24 because of the prior sentence which -- in which the judge  
25 indicated do not consider parole or parole --

1 QUESTION: Well, then it -- then you are taking  
2 the position that the jury is not entitled to know the  
3 meaning of the terms which it must use in pronouncing the  
4 sentence.

5 MR. HARPOOTLIAN: I am of the opinion --

6 QUESTION: Because you are saying, if I  
7 understand you, that they do have to use this term, but it  
8 is perfectly proper to deny them a definition of it.

9 MR. HARPOOTLIAN: The term --

10 QUESTION: Because that's what South Carolina  
11 said.

12 MR. HARPOOTLIAN: I just don't think parole is  
13 part of the definition of the term --

14 QUESTION: I'm not talking about parole. I'm  
15 talking about the meaning of life imprisonment.

16 MR. HARPOOTLIAN: No, what I'm saying is --

17 QUESTION: Do they have to be given the  
18 definition of life imprisonment if they're going to use  
19 that as a sentencing alternative?

20 MR. HARPOOTLIAN: I think that they have to be  
21 given -- they have to have a definition of life. I just  
22 don't think parole is part of that. And I think that the  
23 first sentence excludes parole from that.

24 QUESTION: Okay, so we're back to the question.  
25 If the definition they were given by the court is

1 inadequate, if we assume that -- you don't, I recognize  
2 that.

3 MR. HARPOOTLIAN: Right.

4 QUESTION: And I'm not asking you to concede it.  
5 But if you assume it for the sake of argument, then we get  
6 a reversal here.

7 MR. HARPOOTLIAN: If one of the two sentences is  
8 misunderstood, there's a reasonable likelihood of  
9 misunderstanding under Boyde, yes, sir.

10 QUESTION: Okay.

11 MR. HARPOOTLIAN: If we have not met the  
12 Boyde -- the Boyde v. California standard.

13 QUESTION: But you say it's legally irrelevant  
14 that there are, in fact, two different kinds of life  
15 sentences, life with parole and life without parole, that  
16 that's legally irrelevant?

17 MR. HARPOOTLIAN: That is correct.

18 QUESTION: Mr. Harpootlian, do most States that  
19 have a system of life without parole tell the juries that  
20 it's life imprisonment without parole?

21 MR. HARPOOTLIAN: There are a variety --  
22 different States have different schemes, if you will.  
23 Pursuant to this Court's decision in Ramos, the States  
24 felt that they could develop different schemes. And a  
25 number --

1 QUESTION: It was my understanding that most  
2 States that have adopted a life imprisonment without  
3 parole go ahead and advise juries if a jury is  
4 sentencing --

5 MR. HARPOOTLIAN: Many --

6 QUESTION: -- That it's life imprisonment  
7 without parole.

8 MR. HARPOOTLIAN: Many do, but many have a  
9 specific verdict by the jury of life without parole.

10 QUESTION: How many States would do as South  
11 Carolina and refuse to clarify that?

12 MR. HARPOOTLIAN: There are three.

13 QUESTION: And they are?

14 MR. HARPOOTLIAN: Virginia, South Carolina,  
15 North Carolina -- and Pennsylvania, I'm sorry.

16 QUESTION: Pennsylvania instead of North  
17 Carolina or in addition?

18 MR. HARPOOTLIAN: Yes, sir, I'm sorry. I would  
19 submit to the Court that to expand the Eighth Amendment to  
20 include the custody status, if you will, of a defendant or  
21 a petitioner such as this, strains the use of the Eighth  
22 Amendment.

23 Now, in Skipper this Court ruled that future  
24 adaptability to prison was relevant to the sentencing  
25 authority's decision. And to that end, we go back to the

1 Court's prior cases, Lockett and Eddings and other cases,  
2 in which you talk about the character of the defendant,  
3 the characteristics of his crime and his prior record.  
4 Skipper specifically speaks to future adaptability as  
5 being a characteristic of the defendant. How can parole  
6 ineligibility or parole status fit within that -- that  
7 classification?

8 QUESTION: Suppose in a case the prosecutor  
9 tells the jury, sentence this man to death because if you  
10 don't he can roam free some day and kill somebody?  
11 Suppose the prosecutor says that to the jury, is the  
12 defense counsel entitled to say, now, you've heard the  
13 prosecutor's argument, but I want you to know that in this  
14 State there's life imprisonment without possibility of  
15 parole, which would apply to this defendant?

16 MR. HARPOOTLIAN: That is not the circumstances  
17 in this case. However, if he did that, I think so, yes,  
18 Mr. Kennedy.

19 QUESTION: Well, that's my next point. Wasn't  
20 it, in effect, argued here when the prosecutor said  
21 whether or not the sentence of death for Simmons will  
22 deter anybody else. I submit to you the fact that it will  
23 deter him is plenty, and your verdict should be a response  
24 of society to someone who's a threat. Your verdict will  
25 be an act of self-defense. Don't avoid your



1 responsibility. It's an act of self-defense.

2 MR. HARPOOTLIAN: No argument about release,  
3 about parole,, about being back out on the street. And I  
4 would challenge --

5 QUESTION: You don't think jurors could fairly  
6 infer from that argument that he was a danger to society  
7 because he might be released?

8 MR. HARPOOTLIAN: Well, in this case the  
9 petitioner's own psychologist testified he would be  
10 dangerous, number one. Number two, we have the Skipper  
11 adaptability --

12 QUESTION: All the more reason to tell the jury  
13 that he's going to be confined.

14 MR. HARPOOTLIAN: Well, the Skipper adaptability  
15 evidence was introduced by petitioner and so my position  
16 is that pursuant to the argument taken in context with the  
17 judge's charge, and argument by defense counsel where, on  
18 Joint Appendix page 125, petitioner's argument was that  
19 he's 22 years of age, a life sentence is punishment. The  
20 petitioner in his argument talked about life being life.  
21 the jury, I submit, as the South Carolina Supreme Court  
22 found in their decision in this case, understood life to  
23 mean life. And so the argument has to be in the context  
24 of what the jury was told, not the hypothetical that Your  
25 Honor submits for my examination.

1 QUESTION: Well, wasn't the jury also told by  
2 the use of a phrase that described the prisoner as being  
3 "among us?" I seem to recall that quotation somewhere in  
4 the briefs. Was that phrase used in describing him?

5 MR. HARPOOTLIAN: Yes, sir, in the context -- in  
6 this context. The argument was that the defense has  
7 provided testimony to you that he was abused as a child,  
8 that he underwent a number of difficulties as a child,  
9 that he suffers from a series of stimuli, if you will,  
10 over his young age that made him what he is today. The  
11 argument was that the question isn't how he got here.  
12 He's here; what do we do with him now that he is here  
13 amongst us in our midst.

14 The question is is the enormity of the crime,  
15 that is his personal characteristics, his record, his  
16 personal characteristics, enough -- and I submit it was --  
17 for him to be sentenced to the ultimate punishment of  
18 death.

19 QUESTION: Well, doesn't the description of him  
20 as being amongst us suggest a different answer to Justice  
21 Kennedy's question?

22 MR. HARPOOTLIAN: No, sir, I don't think so.

23 QUESTION: I mean it's -- the argument is  
24 irrelevant unless it is assumed that he will at some point  
25 also continue to be amongst us.

1 MR. HARPOOTLIAN: Well, even if you were to  
2 assume that he was parole eligible, as apparently the  
3 assumption here is, that the jury assumed that, that  
4 doesn't mean he's going to be paroled. There is no  
5 conclusion that he is going to be out. Even if you  
6 assume, that's a decision that will be made by someone --  
7 again, the equation here is that -- not only that parole  
8 ineligibility means he won't be released, but parole  
9 eligibility means that he will.

10 QUESTION: But, I thought you had conceded at  
11 the outset in your answer to my first question that if the  
12 prosecutor did make an argument about prevention of future  
13 crimes, that counsel -- defense counsel could respond to  
14 that?

15 MR. HARPOOTLIAN: That he could -- that if he  
16 argued future crimes against society in general, yes, I  
17 think so, but that wasn't done in this case.

18 QUESTION: So if -- so if we disagree with you  
19 in our interpretation of what the jury might fairly infer  
20 from the prosecutor's argument, then we must reverse on  
21 that basis?

22 MR. HARPOOTLIAN: No, sir, again I would not  
23 concede that reversal is necessary if you find that there  
24 was some talk about future dangerousness beyond the penal  
25 institutions. I would suggest that, again, one -- you're

1 talking -- implying that due process is somehow violated  
2 by the implication, if you will, of future dangerousness.  
3 The judge's charge corrected any assumption that the jury  
4 would have had that he posed a future danger to them. I  
5 don't -- he told them to disregard any terms about parole  
6 or parole eligibility and to give the term "life  
7 imprisonment" its natural -- its plain and ordinary  
8 meaning.

9 So I would not concede that even had the  
10 prosecutor argued that he's some danger, that that was  
11 corrected by this instruction -- the primary instruction  
12 by the court, which was -- he used terms "life  
13 imprisonment" and "death by electrocution" throughout his  
14 charge, and then when the jury came back and asked about  
15 the possibility of parole, to clarify that by saying  
16 disregard it.

17 Just as if they have come back and asked about  
18 some other impermissible area for their inquiry, the  
19 burden of proof, or why the defendant didn't testify, a  
20 number of other areas that this Court has found that  
21 curative or cautionary instructions are very proper. The  
22 State of South Carolina has decided that parole  
23 eligibility or ineligibility is not a proper concern for a  
24 jury.

25 QUESTION: Mr. --

1 QUESTION: But wasn't that determination made  
2 under -- in a much different context. I mean, wasn't the  
3 original reason for not telling the jury about parole  
4 eligibility was the fear that juries might be too harsh on  
5 defendants, either to convict where they might have a  
6 reasonable doubt, or if they have anything to do with  
7 sentencing, to ratchet it up?

8 MR. HARPOOTLIAN: Well, in, of course, State v.  
9 Atkinson, which is the early -- the seventies case, that  
10 was the rationale. But as we go from State v. Atkins in  
11 1987 through State v. Torrence in 1991, I think the  
12 Supreme Court has decided that the -- that these  
13 extraneous factors that had nothing to do with the  
14 criteria laid out in Lockett of the defendant --

15 QUESTION: Now we're switching to -- Lockett is  
16 a different issue. But the initial reason for not telling  
17 the jury about parole was defendant protective, was it  
18 not?

19 MR. HARPOOTLIAN: That is correct, Your Honor,  
20 the initial reason. And, of course, in Ramos, which  
21 petitioner cited, the Briggs instruction was in response  
22 to this -- the jury being told of his ineligibility for  
23 parole. We don't have, and our supreme court has decided  
24 that they don't want to go through that process. And  
25 footnote 30 in Ramos and the rationale in Ramos is that



1 this is a decision best left to the States.

2 And that's what the State of South Carolina did.  
3 The relied on the logic and rationale of Ramos to exclude  
4 factors which they thought would cause undue speculation  
5 with the jury --

6 QUESTION: May I ask a question about the  
7 history of this statute? My recollection may be wrong  
8 because I read the briefs quite a long time ago, but is it  
9 correct that the law-enforcement community in the State  
10 originally opposed life without possibility of parole  
11 because they thought juries would then be inclined to give  
12 that sentence rather than the death sentence; it might  
13 reduce the number of death sentences. And the response  
14 that was made was, well, that won't happen if we can keep  
15 from the juries this new sentence.

16 MR. HARPOOTLIAN: Well, I think that's an  
17 oversimplification. There were some segments of the  
18 law-enforcement community that indicated they did not want  
19 it. Some segments of the law-enforcement community said  
20 they did. And certainly there's no uniform position.

21 QUESTION: But is it correct that one of the  
22 arguments in response was made; well, we will adopt a rule  
23 that will preclude the jury from getting this information?

24 MR. HARPOOTLIAN: I'm sure someone made that  
25 argument, but I don't -- in my opinion --

1 QUESTION: Because that's what the State supreme  
2 court has, in effect, done.

3 MR. HARPOOTLIAN: What the State of South  
4 Carolina Supreme Court has done is asked the jury not to  
5 consider any -- not just parole, but any other extraneous  
6 sentencing factor.

7 QUESTION: Well, I understand. But with  
8 specific reference to this precise point, it is the law of  
9 the State that the jury may not be advised of this --  
10 given this information.

11 MR. HARPOOTLIAN: That is correct.

12 QUESTION: And the reason for it is that they  
13 would therefore be less likely to impose the death  
14 sentence, isn't that what the history teaches us?

15 MR. HARPOOTLIAN: No, sir. No, sir, I think  
16 not.

17 QUESTION: That history didn't come from supreme  
18 court conferences. I assume it came from the legislature.

19 MR. HARPOOTLIAN: It came from newspaper  
20 articles.

21 QUESTION: From newspaper articles. And was  
22 this rule imposed by the legislature or is it one adopted  
23 by the court?

24 MR. HARPOOTLIAN: One adopted by the court.

25 QUESTION: Is there any sentence in South

1 Carolina that -- would a jury ever be put nowadays to a  
2 choice between life with parole and the death penalty, or  
3 is the only -- is the only choice between --

4 MR. HARPOOTLIAN: Life with parole and the death  
5 penalty? Justice Scalia, yes, in most cases, I would  
6 submit, especially in light of an amendment which is cited  
7 in our brief by the legislature, amending this law to do  
8 away with the enhancement of any -- the use of a  
9 conviction prior to January 1, 1986 to enhance.

10 QUESTION: So, if we believe in evenhandedness  
11 and say that the jury must be advised when it is life  
12 without parole, we would then say that the jury must be  
13 advised when it is life with parole?

14 MR. HARPOOTLIAN: If --

15 QUESTION: And that situation can arise.

16 MR. HARPOOTLIAN: In most cases one would -- in  
17 South Carolina right now you would have to have a  
18 prior -- a conviction for a violent crime which carries a  
19 substantial sentence, in most instances do your time, get  
20 out, commit a subsequent crime. And that prior conviction  
21 would have had to have occurred -- or offense would have  
22 had to have occurred after January 1, 1986. So it really  
23 narrows -- the amendment by the legislature last year  
24 limiting the pool, if you will, limiting the enhancement  
25 aspect of that, has really narrowed the pool, so most

1 defendants are going to fall into the parole-eligible  
2 category.

3 QUESTION: Well, we have not advanced a theory  
4 in this Court that the State would be mandated to advise  
5 the jury that the defendant is eligible parole -- for  
6 parole.

7 MR. HARPOOTLIAN: That is correct.

8 QUESTION: We've just said that it'd be  
9 permitted, if it chooses.

10 MR. HARPOOTLIAN: That is correct. That is  
11 correct.

12 QUESTION: Technically, I take it it was error  
13 for the trial judge to include in his response to the  
14 juror's question that statement about giving the terms  
15 their plain and ordinary meaning. Technically, that was a  
16 violation of the supreme -- the State supreme court's  
17 position that you don't instruct on that point.

18 MR. HARPOOTLIAN: Well, the State supreme court  
19 in their decision noted that he used terms that are used  
20 in State v. Norris, but they found that not to be error,  
21 they found that to be appropriate in this case.

22 QUESTION: So they -- I take if they weren't  
23 retreating from their position, they must have assumed  
24 that it didn't amount to a definition?

25 MR. HARPOOTLIAN: Your Honor -- well, I do not

1       assume that.  No, sir, I don't assume that.

2               QUESTION:  But a definition would have been  
3       error.  I mean they -- to get into the issue that the  
4       juror was concerned with would have been to get into  
5       issues which the State supreme court concludes they  
6       shouldn't be considering.

7               MR. HARPOOTLIAN:  This case stands for the  
8       proposition it was not error.  Our supreme court has  
9       decided that was not error.

10              QUESTION:  No, I realize that it has in this  
11       case.  But the general rule still is that you don't get  
12       into parole issues, so therefore assuming the State  
13       supreme court is at least internally consistent on this  
14       point, it must have assumed that this particular  
15       definition did not get into an instruction on parole  
16       eligibility.

17              MR. HARPOOTLIAN:  Well, I would answer that by  
18       saying that that they had not previously put the two  
19       together.  They found it to be constitutionally  
20       acceptable.  And the definition certainly assisted --  
21       should assist the jury in their -- as they said in their  
22       opinion, it would tell the jury that life means life.  
23       That is the South Carolina Supreme Court's conclusion as  
24       to the result of this charge.

25              So considering the Eighth Amendment violation



1 and -- the petitioner would ask you to expand that way  
2 beyond Skipper, to go to a definition that excludes --  
3 that goes outside the definition that's been previously  
4 used by this Court, and to -- I would submit to you, to  
5 result in a situation which would only be part of the  
6 truth, only a small part of the truth.

7           There are 12 statutorily authorized programs, if  
8 you will, that could result in a defendant in a nonparole  
9 sentence, life sentence, to be back into the community.  
10 So if you are going to open that can of worms, if you  
11 will, and our supreme court has said you shall not, you  
12 end up in a situation where -- and, of course, in Ramos it  
13 was found by this Court to be constitutionally acceptable  
14 to do that, but not mandated. And as a result the South  
15 Carolina Supreme Court has said we shall not do that.

16           I would note that this defendant, or any  
17 defendant sentenced to a life without parole sentence --  
18 and if you -- on page 13 of the appendix, Larry Batson of  
19 the Department of Corrections confirms that he'd be  
20 eligible for a pardon, work release, perhaps extended work  
21 released, supervised furlough, provisional parole. Under  
22 the emergency powers overcrowding release he could be  
23 released at some point, trustee status.

24           QUESTION: I thought there were some  
25 limitations, that this particular defendant would not be

1 eligible for furlough?

2 MR. HARPOOTLIAN: Not under State law he would  
3 be. There are currently regulations in the Department of  
4 Corrections that prohibit him from some programs. Pardon,  
5 for instance, he would be entitled to. There is --

6 QUESTION: But all this, work release, parole,  
7 he wouldn't be eligible for that.

8 MR. HARPOOTLIAN: Work release he would be  
9 eligible for.

10 QUESTION: He would be, this defendant?

11 MR. HARPOOTLIAN: He is eligible under State law  
12 for work release. There are regulations within the  
13 Department of Corrections that indicate --

14 QUESTION: We're taking law plus regulations  
15 together.

16 MR. HARPOOTLIAN: He would not be eligible for  
17 extended work release, but as I understand it he would be  
18 eligible for work release. He would be eligible for  
19 supervised furlough to go home for a weekend, to -- AL-3  
20 custody, which, as we note in our brief, would -- after 10  
21 years he would be eligible for AL-3 custody which is  
22 minimum security custody, under the agreement signed by  
23 the Department of Corrections in our prison-overcrowding  
24 lawsuit back in October.

25 He could be -- under section 24-3-210,

1     unsupervised furloughs at the direction or the Commission  
2     of the South Carolina Department of Corrections, for a  
3     weekend, for a holiday. And Mr. Batson confirms that in  
4     his testimony. Use of convict labor on State house  
5     grounds; he could be working on the State house grounds.

6             Now, if we are going -- if the question is when  
7     could he be released, then all these answers must be  
8     given, I submit. Our State supreme court, following the  
9     direction given in State -- in the Ramos --

10            QUESTION: Well, you can't say "must" because,  
11     as Justice O'Connor pointed out, most States that have  
12     life without parole do inform the jury of that. And as I  
13     understand it, they don't go on to suggest what might be  
14     if prison regulations were this way or that way.

15            QUESTION: Well, of course --

16            QUESTION: So it's not -- it can't be a must.

17            MR. HARPOOTLIAN: Well, I submit, Justice  
18     Ginsburg, the -- I agree with you, it should not be, it  
19     would not be a must. But the Supreme Court of the State  
20     of South Carolina has indicated that if we're going to  
21     consider one release mechanism, that it would open the  
22     door to the consideration of other release mechanisms.

23            QUESTION: Her point is that if it must be  
24     provided under coercion, under the coercion of some  
25     principle, that principle would require that other things

1       besides parole be provided.

2               MR. HARPOOTLIAN: That is correct, Justice  
3       Scalia.

4               QUESTION: It's a must in that sense.

5               MR. HARPOOTLIAN: That is correct.

6               QUESTION: Only if we're bound by some  
7       principle.

8               MR. HARPOOTLIAN: If you're bound by some  
9       principle. And I guess that raises the question, what is  
10      the principle here? The principle that petitioner would  
11      have you adopt is that the Due Process Clause of the  
12      Fourteenth Amendment and the Eighth Amendment requires  
13      juries to have a piece of the truth, not the whole truth.  
14      The -- whether or not the --

15              QUESTION: Well, how do we know that? Was there  
16      any attempt to give the whole truth or a request by you to  
17      have the whole truth given?

18              MR. HARPOOTLIAN: Under State v. Torrence we're  
19      not allowed --

20              QUESTION: No, but so there -- that isn't before  
21      us. I mean, your State has decided not to have the whole  
22      truth go forward.

23              MR. HARPOOTLIAN: That is correct.

24              QUESTION: So that if that regime were held to  
25      be invalid, then presumably they would have the

1 opportunity in the next case to say we ought to have a  
2 fair instruction that tells them there are these -- some  
3 possibilities of work release that are not often invoked,  
4 but it is at least a possibility. I don't think your  
5 opponent is denying that.

6 MR. HARPOOTLIAN: But the State of South  
7 Carolina has decided that is less fair.

8 QUESTION: Well, the State of South Carolina has  
9 decided that a half truth is better than a whole truth.

10 MR. HARPOOTLIAN: Well, but the half truth that  
11 the petitioner would have is that he will -- and if you  
12 look at the appendix, you will note that he speaks in  
13 terms of never being eligible -- will spend the rest of  
14 his life in jail. That is the half truth he wants. Those  
15 are the half truths that we were confronted with. You  
16 can't --

17 QUESTION: And as Justice Scalia points out,  
18 perhaps the correct principle is that both sides should be  
19 willing to have the whole truth come up, but that's not  
20 your position.

21 MR. HARPOOTLIAN: That is not my position --  
22 that is not the State of South Carolina's position. I am  
23 a prosecutor. I perhaps have a different position than  
24 the State of Carolina personally.

25 QUESTION: You think you'd do better, maybe,



1 with the whole truth coming out in all the cases.

2 MR. HARPOOTLIAN: I think that if I could get in  
3 front of a jury and read this list of a dozen programs  
4 that would make him eligible for release, that we would  
5 have no more life sentences in the State of South  
6 Carolina. And that is the principle that the State of  
7 South Carolina, through its supreme court, has adopted.

8 QUESTION: And taking just parole alone, if I  
9 understood you correctly earlier, under recent statutory  
10 amendments in South Carolina you think that there are more  
11 cases in which the alternative to death will be life with  
12 parole than in which it will be life without parole?

13 MR. HARPOOTLIAN: There is no question in my  
14 mind about that, no question. Many more, many, many, many  
15 more. And I would submit that the result will be  
16 that -- in South Carolina, if we get into the release  
17 mechanisms -- not just parole, but if we get into those  
18 release mechanisms, I can assure you as a prosecutor,  
19 having appeared before juries many, many times on these  
20 kinds of cases, that the jury then will discount the value  
21 of a life sentence.

22 Thank you very much.

23 QUESTION: Thank you, Mr. Harpootlian.

24 Mr. Bruck, you have 6 minutes remaining.

25 REBUTTAL ARGUMENT OF DAVID I. BRUCK

1 ON BEHALF OF THE PETITIONER

2 MR. BRUCK: Mr. Chief Justice, I rise only to  
3 clarify a couple of factual items. Mr. Harpootlian, no  
4 doubt inadvertently, misdescribed the requested  
5 instruction made by the defendant. The request is at  
6 page -- pages 21 and 22 of the Joint Appendix, and it is  
7 simply that the judge read the no parole statute to the  
8 jury. As an alternative when that was denied, we then  
9 requested, as very much second or third best, a more vague  
10 instruction about that he actually will be sentenced to  
11 serve life in the State penitentiary. But that was not  
12 the request we made and that is not the request upon which  
13 this case turns.

14 QUESTION: Let's assume you had gotten what you  
15 asked for. At least to the extent that you asked for it,  
16 would you take the bitter with the sweet and concede that  
17 it would be appropriate to read some more instructions to  
18 the jury, some more statements of law to the jury, going  
19 into questions -- the possibilities of furlough and work  
20 release and so on?

21 MR. BRUCK: Providing those are accurate, I  
22 think under the Eighth Amendment, for purposes of this  
23 morning, yes. I don't think the South Carolina Supreme  
24 Court will necessarily allow these -- what are, in fact,  
25 very speculative and remote possibilities. The record, as

1       opposed to the list that Mr. Harpootlian just --

2               QUESTION: Well parole may be very speculative  
3 too for someone committed -- who's committed a horrible  
4 crime and sentenced to life imprisonment.

5               MR. BRUCK: Absolutely.

6               QUESTION: That's very speculative.

7               MR. BRUCK: Yes. And, of course, in this case  
8 it is not only -- the chance of his being released on  
9 parole is not merely highly speculative but legally  
10 nonexistent. The record actually shows that no life  
11 without parole inmate had ever been granted a furlough,  
12 and it goes on and on. Under the regulations they are  
13 not eligible for work release. This long laundry list of  
14 12 possibilities, if you look closely at the record, is  
15 actually vanishingly small. And, yes, we are willing to  
16 take the bitter with the sweet, as a matter of Eighth  
17 Amendment law.

18               Justice O'Connor inquired about the list of  
19 States. I would simply direct the Court's attention to  
20 pages 39 to 41 of our brief, that's footnotes 23 to 27,  
21 which gives in some detail exactly what all of the  
22 life-without-parole States have to say on this issue.

23               Finally, I would just note the issue -- the  
24 history of this issue in South Carolina has been somewhat  
25 torturous. We describe it in our brief. Shortly after

1 life without parole became an option for recidivist cases,  
2 the State supreme court said that on the request of a  
3 defendant restrictions on parole should be charged, and  
4 that was the law until a month before this trial.

5 This is the first case to be tried under the new  
6 regime of State v. Torrence which overruled that majority  
7 practice and said that from now on the jury should be left  
8 in the dark, and therefore I think it is at least  
9 fortuitous that this practice is a novel one and can and  
10 should, we submit, be nipped in the bud.

11 If there are no further questions, that's all we  
12 have.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bruck.

14 The case is submitted.

15 (Whereupon, at 11:564 a.m., the case in the  
16 above-entitled matter was submitted.)  
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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

JONATHAN DALE SIMMONS, v. SOUTH CAROLINA No. 92-9059

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BY Ann Marie Federico

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